Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

DIANA CASEY, *et al.*,
Petitioners,

v.

RETIREMENT BOARD OF THE RHODE ISLAND EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a legislatively-established public employee retirement system does not by its terms expressly create or disclaim a contractual relationship between the state and the members of the system, is a state statute that retroactively abrogates the retirement benefits of members exempt from scrutiny under the Contract Clause of the United States Constitution on the ground that the members' entitlement to such benefits is not contractual in nature, even though at the time of the abrogation the retirement benefits were "vested," and many of the members already had retired and were receiving the retirement benefits?

PARTIES

Petitioners are Diana Casey, Edward Casey, Robert Casey, Bernard Connerton, Denise Felice, Joseph Grande, Gloria Heisler, Robert Joy, Cornelius McAuliffe, Edward McElroy, Ronald DiOrio, Harvey Press, Bernard Singleton, and the Rhode Island Federation of Teachers.

Respondents are the Retirement Board of the Rhode Island Employees' Retirement System; Nancy Mayer, Chairperson and Treasurer of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity; and Joann Flaminio, Executive Director of the Retirement Board of the Rhode Island Employees' Retirement System in her official capacity.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit in *National Education Association-Rhode Island v. Retirement Board of the Rhode Island Employees' Retirement System*, 172 F.3d 22 (1st Cir. 1999).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 172 F.3d 22, and is reproduced in the Appendix to this Petition ("App.") at 1a. The judgment of the United States District Court for the District of Rhode Island is unreported and is repro-

duced in the Appendix at 19a. The opinion of the district court on the parties' cross-motions for summary judgment is reported at 972 F. Supp. 100, and is reproduced in the Appendix at 24a. The opinion of the district court denying defendants' motion to dismiss is reported at 890 F. Supp. 1143, and is reproduced in the Appendix at 67a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on March 24, 1999. A timely Petition for Rehearing and Rehearing En Banc was denied by order entered May 5, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Contract Clause of the United States Constitution, U.S. Const. art. I, § 10, cl. 1, provides in pertinent part as follows: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ."

R.I. Gen. Laws § 36-9-33 (repealed) is reproduced in the Appendix at 116a. The text of 1988 R.I. Pub. Laws ch. 486 is reproduced in the Appendix at 118a. R.I. Gen. Laws §§ 36-9.1-1 to -2 is reproduced in the Appendix at 119a.

STATEMENT OF THE CASE

A. Factual Background

At issue in this lawsuit is a statute that was enacted by the Rhode Island legislature on July 15, 1994—R.I. Gen. Laws §§ 36-9.1-1 to -2—which evicted petitioners from the Rhode Island State Employees' Retirement System ("Retirement System"), and retroactively abrogated certain retirement benefits to which they were entitled ("Evic-

tion Act"). As of the effective date of the Eviction Act, many of the petitioners already had retired and were receiving their retirement benefits. The remaining petitioners still were actively employed on July 15, 1994, but their benefits were "vested" because they had met the Retirement System's years-of-service vesting requirement.

The retirement benefits in question had been acquired by petitioners pursuant to a statute that had been enacted by the Rhode Island legislature seven years earlier—on July 3, 1987. This latter statute—R.I. Gen. Laws § 36-9-33—enabled full-time employees of unions that represent Rhode Island public employees in collective bargaining to become members of the Retirement System, § 36-9-33(a), and to purchase credits for past years of such union employment, § 36-9-33(b). In allowing these employees to participate in the Retirement System, Rhode Island was following the lead of the federal government and at least ten other states,[1] with the apparent goal of encouraging unions that represent the state's workforce to recruit their own staffs from among the employees that they represent.[2]

Shortly after § 36-9-33 was enacted, it became the object of heated political controversy, and eleven months later—on June 6, 1988—the Rhode Island legislature

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1 *See* 5 U.S.C. § 8411(e); Alaska Stat. § 14.25.045; Fla. Stat. § 238.01(3); Ga. Code Ann § 47-3-1(28)(N); Ill. Rev. Stat. Ch. 40 para. 5/16-106(8); Ky. Rev. Stat. Ann. § 161.220(4)(f); La. Rev. Stat. Ann. § 11:701(23); N.D. Cent. Code § 15-39.1-04(11)(b); S.C. Code Ann. § 9-1-10(4)(e); Wash. Rev. Code § 41.40.023(11); Wyo. Stat. § 9-3-402(a)(vi)(F), (H).

2 While petitioners came within the purview of § 36-9-33 because they were or had been employees of the type of union referenced in the statute, most if not all of them were, or at some point in their careers had been, public school teachers or other public employees. Accordingly, many of the petitioners already were members of the Retirement System when § 36-9-33 was enacted.

repealed the statute. 1988 R.I. Pub. Laws ch. 486. In 1989, a state court held that the repeal was prospective only and thus did not affect petitioners—all of whom had taken the steps necessary to exercise their rights under § 36-9-33 prior to its repeal. That holding was not appealed, and for approximately the next four years § 36-9-33 was implemented as to petitioners,[3] many of whom made important career and personal decisions in reliance on the retirement benefits that they had acquired pursuant to the statute.

In 1994, § 36-9-33 again became a politically charged issue in Rhode Island politics. During that year's session of the Rhode Island legislature, bills were introduced in both houses of the legislature to undo the remaining effects of § 36-9-33. These bills evicted from the Retirement System the few individuals who had become members of the System by virtue of § 36-9-33, and retroactively abrogated any entitlement to retirement benefits that had been acquired pursuant to the statute. The proposed bills were politically popular and—despite concerns by many legislators about their constitutionality[4]—were enacted.

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[3] The Retirement System is a "contributory" system, and petitioners began contributing 7.5% of their salaries, which was the same rate of contribution as that for all other members of the System. Similarly, the unions that employed petitioners became "employers" in the Retirement System, and began making the standard employer's contribution on their behalf.

[4] As the Chairman of the House Judiciary Committee candidly admitted during the floor debate:

> I don't have the guts to vote against the bill because I can't explain it in 25 words or less to my constituents . . . . In my six years up here, never have I ever heard so much, so many doubts about the constitutionality of something we're proposing to do.

Proceedings at Hearing in Re: Discussions Regarding # 94 H-9040, Before the General Assembly, June 16, 1994.

On July 15, 1994—the date on which the Eviction Act became effective—the abrogated retirement benefits of petitioners were "vested" because petitioners had met the Retirement System's vesting requirement of ten years of credited service. Indeed, as of that date, a number of petitioners already had retired and were receiving their retirement benefits. Although some of these petitioners had made the irrevocable decision to retire in reliance on the retirement benefits to which they were entitled under § 36-9-33, these benefits were totally abrogated as a result of the Eviction Act.[5]

B. Proceedings Below

This lawsuit was brought by 21 individual plaintiffs (including petitioners), as well as the two unions that had employed them and that, pursuant to § 36-9-33, had become "employers" under the Retirement System. Plaintiffs challenged the constitutionality of the Eviction Act under the Contract, Takings, and Due Process Clauses of the United States Constitution. They sought declaratory and injunctive relief, as well as restoration of monies lost because of their eviction from the Retirement System and the abrogation of the retirement benefits to which they had been entitled. Federal jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(3).[6]

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[5] To cite but one example, petitioner Gloria Heisler retired from her job as a public school teacher in 1990 at age 62. At the time of her retirement, Heisler had been a teacher and member of the Retirement System for nearly 20 years and had acquired tenure in her position. Heisler had purchased credits for earlier union employment (as a secretary) pursuant to § 36-9-33(b). Four years after Heisler's retirement, her retirement benefits were cut nearly in half as a result of the Eviction Act, notwithstanding that she had relied on the benefits promised to her under § 36-9-33 when she decided to retire at age 62 rather than continue working.

[6] One additional plaintiff, Richard DeOrsey, was subsequently permitted to intervene in the lawsuit. DeOrsey, who was unsuccess-

Defendants moved to dismiss, but the district court (Hon. Ronald R. Lagueux) denied their motions in a decision issued on July 7, 1995. App. 67a. Focusing principally on the Contract Cause, the court applied the traditional three-prong inquiry—*i.e.*, (1) whether the challenged statute infringed upon a right arising from a "contractual agreement," (2) if so, whether that contractual right had been "substantially impaired," and (3), if there was such impairment, whether it was "reasonable and necessary to serve an important public purpose." *Id.* at 76a-77a.

The district court held that, on the facts alleged in the complaint, an implied-in-fact contract had been created between plaintiffs and the Retirement System. *Id.* at 77a-103a. The court also found that the Eviction Act had "substantially impair[ed]" that contractual relationship. *Id.* at 102a-103a. With regard to the final step of the Contract Clause inquiry, the court described defendants' asserted justifications for the Eviction Act as "conclusory" and "disingenuous," but noted that factual development was required to determine whether defendants could satisfy the "reasonable and necessary" standard. *Id.* at 103a-106a.

After discovery, the parties cross-moved for summary judgment, and on August 7, 1997, the district court ruled on these motions. App. 24a. Relying principally on the Takings Clause, rather than the Contract Clause, *see id.* at 50a-59a, the court found the determinative question to be whether, at the time of enactment of the Eviction Act, a particular plaintiff's retirement benefits had "vested."

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ful in the trial court, filed a separate appeal with the First Circuit. Although his appeal was heard and decided together with petitioners' appeal, the Court of Appeals denied a motion to consolidate the appeals. Accordingly, DeOrsey is not a party to this Petition.

App. 50a.[7] Accordingly, the court declared the Eviction Act unconstitutional as applied to those plaintiffs who, as of July 15, 1994, had met what the court understood to be the Retirement System's requirement for vesting, and it upheld the Act as applied to those plaintiffs who, as of that date, had not met that requirement. After the resolution of certain factual issues with respect to several of the plaintiffs, the court entered judgment on June 2, 1998. App. 19a.

Defendants appealed, arguing, in pertinent part, that none of the plaintiffs had a contractual right to any retirement benefits acquired pursuant to § 36-9-33. Certain of the nonprevailing plaintiffs cross-appealed. These plaintiffs did not quarrel with the fact that the district court had distinguished between vested and non-vested retirement benefits, but contended that the court had misunderstood the Retirement System's requirement for vesting.[8] Following briefing and argument, a panel of the Court of Appeals (per Boudin, J.) ruled in favor of defendants. The court held that none of the plaintiffs had a contrac-

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[7] Retirement systems generally—whether in the public or private sector—provide that a member's retirement benefits vest after the acquisition of a requisite number of years of credited service, although the employee may not be eligible to retire and actually draw those benefits until he or she reaches a specified age. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Governments, 1994*, at 113-14 (1996).

[8] The district court had held that a member of the Retirement System must have acquired the requisite years of credited service *and* met the age requirement for retirement in order to have a vested right to retirement benefits. The cross-appellants, who had the requisite years of credited service but had not yet attained retirement age, relied, *inter alia*, on R.I. Gen. Laws § 36-10-11, which expressly provides that a member's rights vest upon completion of ten years of service, regardless of whether the member has reached retirement age. The First Circuit did not reach this issue, and, accordingly, it is not implicated in this Petition.

tually enforceable right to their § 36-9-33 retirement benefits, and the state therefore was free to abrogate them at will. App. 10a-11a.

The First Circuit began its analysis by observing that, with regard to private-sector retirement systems, "a substantial body of case law treats such plans as implied contracts, protecting at least those whose rights have 'vested.' " *Id.* at 8a. In the public sector, the court stated, the law is "less settled." *Id.* Citing this Court's 1937 decision in *Dodge v. Board of Education,* 302 U.S. 74, 78-79 (1937), the First Circuit noted that "Supreme Court precedent has tended to treat government pension statutes as . . . subject to modification for payments not yet made, unless the government's intent to create a contract is clear and definite." App. 9a. And, the court "d[id] not think that the Rhode Island general pension statute 'clearly and unequivocally' *contracts* for future benefits." *Id.* at 10a (emphasis in original) (quoting *National R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co.,* 470 U.S. 451, 465-66 (1985) ("*Amtrak*")). The court emphasized in this regard that "[n]owhere does the statute call the pension plan a 'contract' or contain an anti-retroactivity clause as to future changes." *Id.* at 11a.

Plaintiffs had relied, *inter alia,* on the provision in the Retirement System that "[t]he right of a service retirement allowance under the provisions of this chapter *shall vest* in a member" who satisfies the requisite years-of-service requirement, R.I. Gen. Laws § 36-10-11 (emphasis added), but the First Circuit found this reliance misplaced. Unlike the district court, the court below did not consider "vesting" determinative—or, indeed, even relevant—as to the existence *vel non* of contractual rights. "Vesting," said the court, indicated nothing more than eligibility for retirement benefits upon the attainment of

retirement age: "Whether a plan affords contractual protections against a change in its terms is a different question." App. 11a.

Having concluded that the statutory language did not "clearly and unequivocally" create contractual rights, the First Circuit then "turn[ed] from language to circumstances," *id.* at 12a, but it found nothing in the circumstances surrounding enactment or implementation of the Retirement System, or the status of plaintiffs, that would warrant treating the retirement benefits in question as contractual. The court observed that, although "it is true that *today* private pensions are often conceived and crafted more as deferred compensation than as gifts," *id.* at 12a (emphasis in original), "Rhode Island's general pension plan was created in 1936 when the view of pensions taken in *Dodge* was quite widespread." *Id.* at 12a. Declaring that "the clear statement rule [of *Amtrak*] is binding unless and until altered by the Supreme Court," *id.* at 13a, and that it would be a "conundrum" to hold that a " 'statutory' contract" could satisfy that rule "by . . . implication rather than clear language," *id.*, the First Circuit held that none of the petitioners had a contractual claim.

Having resolved petitioners' Contract Clause claim on that basis, the First Circuit had no occasion to address the second and third prongs of the Contract Clause inquiry—*i.e.*, whether petitioners' contractual rights had been "substantially impaired," and whether any such impairment was "reasonable and necessary to serve an important public purpose." [9]

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[9] The court also rejected petitioners' claims under the Takings and Due Process Clauses (even though the latter claim had not been pursued on appeal). App. 13a-18a. These alternative grounds for relief are not raised by this Petition.

REASONS FOR GRANTING THE WRIT

There are at the present time over 2,000 state and local government retirement systems in existence, with more than ten million members. *See* Employee Benefit Research Institute, *EBRI Databook on Employee Benefits* 148 (4th ed. 1997). Unlike their private-sector counterparts, these members of public-sector retirement systems cannot look to the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), to assure that they will in fact receive the retirement benefits that have been promised to them: ERISA does no apply in the public sector. *See* 29 U.S.C. § 1003(b)(1). Nor can these public employee members find such assurance in collective bargaining agreements that have been negotiated by their unions: because public-sector retirement systems invariably are established by statute, the retirement benefits of public employees are in most jurisdictions not an appropriate subject of bargaining. Accordingly, when government attempts to abrogate or modify the retirement benefits for which public employees have become eligible, these employees must look elsewhere for protection —and the source of law most commonly invoked in this regard is the Contract Clause of the United States Constitution.

This lawsuit involves application of the Contract Clause to a state retirement system.[10] Specifically at issue is the first prong of the Contract Clause inquiry—*i.e.*, whether, and under what circumstances, a state retirement system establishes a contractual relationship between the state and the members of the system so as to trigger constitu-

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[10] For this reason, we use the term "state retirement system" in this Petition. The analysis extends, however, to any non-federal public sector retirement system, including the large number of such systems that have been established by local governments.

tional scrutiny.[11] With regard to some state retirement systems, this inquiry need go no further than the statutory language itself. Thus, the legislature may have expressly declared that the rights created under the system are contractual.[12] In other cases, the statute expressly may disclaim a contractual relationship—through, for example, an explicit reservation by the state of the right to abrogate or amend the benefits provided by the retirement system.[13] But these are exceptions to the rule, and

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[11] Whether a contract was formed for purposes of the Contract Clause is a matter of federal law, as to which the federal courts "can not surrender the duty to exercise [their] own judgment." *General Motors Corp. v. Romein*, 503 U.S. 181, 187 (1992) (internal quotations and citation omitted). As indicated, if this threshold question is answered in the affirmative, the next step is to determine whether the claimant's contractual rights have been substantially impaired, and, if so, whether that impairment was "reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977). These latter questions are not implicated by this Petition: inasmuch as the First Circuit denied all relief on the ground that petitioners had *no* contractual rights, it is only the existence *vel non* of a contractual relationship that is before this Court.

[12] *See, e.g.*, N.Y. Const. art. V, § 7 ("membership in any pension or retirement system of the state or of a civil division thereof is to be a contractual relationship, the benefits of which shall not be diminished or impaired"); Mass. Gen. L. ch. 32, § 25(5) (establishing membership in the Massachusetts Retirement System "as a contractual relationship under which members . . . are entitled to contractual rights and benefits, and no amendments or alterations shall be made that will deprive any such member or any group of such members of their pension rights or benefits . . .").

[13] *See, e.g.*, 74 Pa. Cons. Stat. § 1724(c) (under retirement system of public transportation authority, benefits may be "modified from time to time"); R.I. Gen. Laws § 45-21-47 (Rhode Island's *Municipal* Employees' Retirement System, which states that "[t]he right to amend, alter, or repeal this chapter at any time or from time to time is expressly reserved . . ."). While a provision reserving the right to modify or repeal a state retirement system is not necessarily dispositive, *see McGrath v. Rhode Island Retirement Board*,

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the typical state retirement system does not, by its terms, expressly create or disclaim a contractual obligation on the part of the state.

What we have in this lawsuit is such a typical state retirement system. Because the court below held that there was no contractual relationship *even as to* those petitioners who already had retired and were receiving their retirement benefits when the Eviction Act was enacted, its decision can only be read to mean that the members of the vast majority of state retirement systems—*i.e.*, those in which the statutory language does not expressly indicate whether or not a contractual relationship is established—*never* acquire rights to their retirement benefits that are protected by the Contract Clause.[14] This surely cannot be correct, and if the First Circuit simply had misapplied settled law, it would be appropriate and sufficient for this Court to summarily reverse.

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88 F.3d 12, 17-18 (1st Cir. 1996), such a provision at least casts the inquiry in a different light.

[14] The court below left open the possibility that petitioners' rights to retirement benefits might be of a lesser quality than those of "long-time state employees," on the ground that "these particular plaintiffs do not have the benefit of a clear and longstanding employer-employee relationship *with the government*." App. 12a (emphasis in original). The purported distinction is untenable. All of the petitioners had an "employer-employee relationship" with an entity that the Rhode Island legislature, in enacting § 36-9-33, determined should be treated as a public employer for purposes of the Retirement System. That employment relationship —alone or in combination with other covered employment—was sufficiently "longstanding" for all of the petitioners to have obtained the requisite ten years of service for their retirement benefits to become vested. Because there is, thus, no conceivable legal basis for analyzing petitioners' rights under the Retirement System any differently from those of other members of the System, the First Circuit's analysis necessarily applies to all members of the Retirement System at issue in this lawsuit, and more generally to public employee members of other state retirement systems as well.

But the law in this area is anything but settled, and the decision of the court below—which we note in passing is analytically inconsistent with another First Circuit decision decided only three years earlier[15]—is reflective of the general confusion that exists among state and lower federal courts as to the application of the Contract Clause to the vast majority of state retirement systems, which do not by their terms expressly create or disclaim a contractual relationship between the state and the members of the system. As one federal appellate court has put it, this is "a legal issue of considerable importance," *Parker v. Wakelin*, 123 F.3d 1, 4 (1st Cir. 1997), *cert. denied*, 118 S. Ct. 1675 (1998), the answer to which "varies greatly from state to state, and has not been the subject of federal regulation or harmonization." *Id.* at 6. Although this Court recently has set forth the general standard to be applied in determining whether a legislative enactment creates a contractual obligation, *see Amtrak*, 470 U.S. at 465-66, its principal decision addressing that question in the specific context of a state retirement system, *Pennie v. Reis*, 132 U.S. 464 (1889), is over a century old and largely has "been ignored as a precedent." *Parker*, 123 F.3d at 6.

This Court should grant review in order (1) to determine whether the position that it took more than a hundred years ago in *Pennie* has any continuing vitality; and, if not, (2) to establish an analytical framework that can be applied by state and lower federal courts so as to produce some measure of uniformity in how they deal with this important question of federal law.

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[15] In *McGrath v. Rhode Island Retirement Bd.*, *supra*, involving Rhode Island's *Municipal* Employees' Retirement System, the court recognized that this "principle that a pension plan represents an implied-in-fact unilateral contract . . . has been applied repeatedly to state and municipal pension plans," as well as to those in the private sector. 88 F.3d at 17 (citing cases).

I. *PENNIE v. REIS*

As indicated above, this Court's principal precedent addressing the contractual nature *vel non* of a state retirement system is *Pennie v. Reis*, a case decided more than a hundred years ago under the Due Process Clause. In *Pennie*, this Court viewed the retirement benefits of public employees as gratuities that were "subject to change or revocation at any time, at the will of the Legislature." 132 U.S. at 471. It added: "There was no contract on the part of the State that its disposition should always continue as originally provided." *Id.* This Court subsequently applied *Pennie* in the 1930s in *Dodge v. Board of Education*, 302 U.S. 74 (1937), in which it affirmed a decision of the Illinois Supreme Court that a statute decreasing the retirement benefits paid to retired Chicago public school teachers under a state retirement system did not violate the Contract Clause.

In the century since it was decided, *Pennie*'s "reasoning has been widely—and justifiably—criticized." Note, *Public Employee Pensions in Times of Financial Distress*, 90 Harv. L. Rev. 992, 994 (1977). As the First Circuit has observed, while *Pennie*'s "'gratuity' approach has been rejected by most state courts, *Pennie* has never been explicitly overruled. . . . *Pennie* has, however, been ignored as a precedent . . ." *Parker*, 123 F.3d at 6; *see also McGrath*, 88 F.3d at 16 (noting that *Pennie*'s view of retirement benefits "as mere gratuities" has been abandoned under "evolving legal doctrine"); *Transport Workers, Local 290 v. SEPTA*, 145 F.3d 619, 623 (3d Cir. 1998) ("While *Pennie* has never been expressly overruled, most state supreme courts subsequently rejected the 'gratuity' approach in favor of an approach that viewed such programs as creating implied-in-fact unilateral contracts"). Indeed, as we demonstrate below, the mere notion that public-sector retirement benefits are no more than "gra-

tuities" has been rejected not only "by most state courts," but also by the three other federal circuits to have addressed the issue.

In view of the disconnect between the stated position of this Court—*i.e.*, that public-sector retirement benefits are no more than mere "gratuities" revocable at will—and the rejection of that position by the vast majority of courts, it is time for this Court once again to address the issue in order to provide guidance that reflects a modern understanding of the nature and purpose of state retirement systems. Because, as this Court repeatedly has instructed state and lower federal courts, they are obligated to apply this Court's existing precedents even when those precedents have been undermined by more recent legal developments, *see Agostini v. Felton*, 521 U.S. 203, 237 (1997); *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997), it is imperative that this Court revisit an issue such as this one where its teaching is so clearly out of line with the development of the law.

II. CONFLICT AMONG LOWER COURTS

In the absence of contemporary guidance from this Court, state and lower federal courts have adopted conflicting views regarding the contractual nature *vel non* of retirement benefits provided by state retirement systems that do not expressly speak to the issue.

A. The "gratuity" approach adopted in *Pennie* continues to have some adherents—including presumably the court below—but very few. *See Cook v. Employees Retirement Sys.*, 514 S.W.2d 329, 331 (Tex. Civ. App. 1974); *Ballard v. Board of Trustees*, 324 N.E.2d 813, 815 (Ind. 1975).

B. Most courts have adopted what the Ninth Circuit has characterized as "the modern and better-reasoned view" that public employees have contractual rights under

state retirement systems, and that those rights accrue from the commencement of covered employment. *Nevada Employees' Ass'n, Inc. v. Keating*, 903 F.2d 1223, 1227 (9th Cir.), *cert. denied*, 498 U.S. 999 (1990). This view has been adopted by the majority of state appellate courts that have addressed the issue.[16]

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[16] *See Yeazell v. Copins*, 402 P.2d 541, 545 (Ariz. 1965); *Betts v. Board of Admin. of the Pub. Employees' Retirement Sys.*, 582 P.2d 614, 617 (Cal. 1978); *Police Pension and Relief Bd. v. Bills*, 366 P.2d 581, 584 (Colo. 1961); *Nash v. Boise City Fire Dept.*, 663 P.2d 1105, 1108-10 (Idaho 1983); *Brazelton v. Kansas Pub. Employees Retirement Sys.*, 607 P.2d 510, 514 (Kan. 1980); *City of Frederick v. Quinn*, 371 A.2d 724, 726 (Md. App. 1977); *Campbell v. Michigan Judges' Retirement Bd.*, 143 N.W.2d 755, 757-58 (Mich. 1966); *Sylvestre v. State*, 214 N.W.2d 658, 666-67 (Minn. 1973); *Halpin v. Nebraska State Patrolmen's Retirement Sys.*, 320 N.W.2d 910, 914-16 (Neb. 1982); *Public Employees' Retirement Bd. v. Washoe County*, 615 P.2d 972, 974-75 (Nev. 1980); *Oregon State Police Officers' Ass'n v. State*, 918 P.2d 765, 779 (Ore. 1996); *Association of Pa. State Coll. and Univ. Faculties v. State Sys. of Higher Educ.*, 479 A.2d 962, 966 (Pa. 1984); *Burlington Fire Fighters Ass'n v. Burlington*, 543 A.2d 686, 689-90 (Vt. 1988); *Leonard v. City of Seattle*, 503 P.2d 741, 746 (Wash. 1972); *Wagoner v. Gainer*, 279 S.E.2d 636, 643-44 (W. Va. 1981).

Notwithstanding their agreement that a contract exists from the first day of employment, these jurisdictions differ as to the state's ability thereafter to modify the benefits provided by the retirement system. Several courts have held that the state may not unilaterally amend the system in derogation of the employee's contractual rights at any time. *See Yeazell*, 402 P.2d at 545 (a contract is complete when an employee accepts employment, and a "contract cannot be unilaterally modified nor can one party to a contract alter its terms without the assent of the other party"); *Sylvestre*, 214 N.W.2d at 666-67; *Campbell*, 143 N.W.2d at 757-58. Other courts allow for certain "reasonable modifications" of the existing contract. While the reasoning of these latter cases is not always clear, their limitations on the employee's contractual rights are best understood as based on the second and third prongs of Contract Clause analysis. Thus, as the Ninth Circuit explained in *Keating*, even though an employee has a contractual right to the retirement benefits in effect on the first day of his or her employment, if subsequent enactments "constitute[] a reasonable modifi-

C. Other courts, while agreeing that the retirement benefits provided by state retirement systems are contractual in nature, reject the principle that a contract exists as soon as a covered employee begins to tender performance, and focus instead upon the completion of performance. In one view, the necessary performance is completed, and the retirement benefits are contractually protected, when they become "vested"—which under virtually all state retirement systems is when the employee satisfies the system's years-of-service requirement. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Benefits in State and Local Government, 1994* 113-14 (1996). Illustrative of this approach are *Petras v. State Bd. of Pension Trustees,* 464 A.2d 894, 896 (Del. 1983), and *Blackwell v. Quarterly County Court,* 622 S.W.2d 535, 543 (Tenn. 1981).

A variant of this approach views contractually enforceable rights as accruing only when the employee has satisfied the state retirement system's years-of-service requirement *and* has reached retirement age, thus becoming eligible to actually retire and receive retirement benefits. *See Baker v. Oklahoma Firefighters Pension & Retirement Sys.*, 718 P.2d 348, 352-53 (Okla. 1986). Yet another variant is to treat retirement benefits as contractual only with respect to employees who already have retired, but not with respect to other employees. The Fourth Circuit and at least one state supreme court have taken this latter position. *See Kestler v. Board of Trustees of N.C. Retirement Sys.*, 48 F.3d 800, 803-04 (4th Cir.), *cert. denied,* 516 U.S. 868 (1995); *Florida Sheriffs Ass'n v. Department of Admin.*, 408 So. 2d 1033, 1036 (Fla. 1981).

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cation of the pension plan, then they [do] not create a substantial impairment of contractual obligations." 903 F.2d at 1227.

* * *

The "great diversity," *Baker*, 718 P.2d at 351, of views as to the contractual nature of retirement benefits provided by state retirement systems is manifest, and has been noted with concern by the lower courts. *See, e.g., Brazelton*, 607 P.2d at 514 (declining to write "a dissertation on the historical background of the various theories prevailing today"). To be sure, this diversity may to some extent be attributable to differences in the language and structure of the various state retirement systems. To a much larger extent, however, it is attributable to the absence of a controlling framework for Contract Clause analysis based on a modern understanding of the nature and purpose of state retirement systems. The decision of the Court below—which sustained the right of the Rhode Island legislature retroactively to abrogate vested retirement benefits, even as to those petitioners who already had retired and were receiving their retirement benefits—is at the extreme end of the spectrum of approaches that have been adopted by the lower courts, and presents in stark fashion the legal and equitable aspects of this important federal question. As such, it offers this Court a particularly appropriate vehicle to establish a set of guiding legal principles that lower courts can use to determine whether and when members of state retirement systems acquire rights that are protected by the Contract Clause.

Although a full explication of petitioners' views as to the appropriate relationship between the Contract Clause and state retirement systems must await briefing on the merits, it may be helpful to explain in summary terms why we believe the analysis of the First Circuit is flawed.

The court below correctly identified the general standard that this Court has established for determining when a statute gives rise to contractual rights—quoting the fol-

lowing passage from *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Ry.* ("Amtrak"), 470 U.S. 451, 465-66 (1985):

> [A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that "a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937) . . . . [T]he principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential powers of a legislative body.

App. 9a (emphasis added by First Circuit). Based upon this passage, the court concluded that the Retirement System could be construed as creating a contractual obligation only if the Rhode Island legislature's intent to bind itself was "clear[ ] and unequivocal[ ]." *Id.* at 10a. The First Circuit's error, we submit, was not so much in identifying this as the applicable standard,[17] but in applying it

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[17] *But see United States v. Winstar*, 518 U.S. 839, 879 (1996) (emphasis added) (limiting application of the "unmistakability doctrine" to situations in which "enforcement of the contractual obligation alleged would block the exercise of a *sovereign power* of the Government"). Indeed, in determining whether the benefits provided by state retirement systems come within the ambit of the Contract Clause, many state courts simply have applied general principles of contract law, without even recognizing a presumption against the creation of contractual rights. *See, e.g., AFSCME Councils 6, 14, 65 and 96 v. Sundquist*, 338 N.W.2d 560, 566 (Minn. 1983) (Minnesota follows a "conventional contract approach"); *Oregon State Police Officers' Ass'n*, 918 P.2d at 773 ("general principles of contract law govern the inquiry").

without regard to the nature and purpose of the particular statute involved.

Amtrak, and most of the other cases in which this Court recently has had occasion to address the question of whether legislative enactments are contractual in nature, have involved what the *Amtrak* Court termed "regulatory statute[s]." 470 U.S. 466. But a state retirement system is not a regulatory statute. It is rather a statute affecting the employment relationship, and "the promise of a pension is part of the compensation package" that is "dangle[d] to attract and retain qualified employees." *McGrath*, 88 F.3d at 16-17.

This promise—fleshed out with specified contribution levels, defined retirement benefits, vesting after a fixed period of employment, etc.—is viewed by most employers and employees, in both the public and the private sectors, as part of the compensation to which an employee is entitled in exchange for the performance of services. *See, e.g., In re Almeida*, 611 A.2d 1375, 1386 (R.I. 1992) (public employee's right to retirement benefits "comprises elements of both the deferred compensation and the contract theories"). This entitlement is recognized and enforced in the private sector by ERISA, but even before ERISA it generally was accepted in that sector that "the promise of a pension constitutes an offer which, upon performance of the required service by the employee becomes a binding obligation." *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 4 (1st Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).[18]

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[18] In one of its early cases in this area, this Court compared statutory enactments governing public-sector retirement benefits to legislation "fixing salaries of [state] officers" or "fixing the term or tenure of a public officer or an employee of a state agency." *Dodge*, 302 U.S. at 78-79. Such legislation, said this Court,

In determining whether a state retirement system is intended to establish a contractual obligation, it is essential to consider the employee expectations that are created by such a system, and the employer's use of those expectations in attempting to compete in the labor market. Thus, statutory language that in other contexts might not be sufficient to indicate the legislature's "clear and unequivocal" intent to bind itself contractually, may well be sufficient to do so with regard to a statute affecting the employment relationship, intended to provide after-the-fact compensation for employees' services, and designed to attract and retain qualified employees.

* * *

As evidenced by the abundance of cases cited above—which represent only a sampling—the question of whether and when members of a state retirement system acquire rights that are protected by the Contract Clause is a recurring one in both federal and state courts. And, it is a question that has assumed increasing importance in recent years, as states have sought to reduce their financial

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> create[d] no contract in [the employees'] favor and the compensation named may be altered at the will of the legislature. . . . The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.

Id. (The court below echoed this view: "After all, legislatures regularly modify compensation schedules and benefit programs." App. 9a.) Whatever the legal merit of that analogy, as an empirical matter the comparison between salaries and retirement benefits is inapt. When an employer alters an employee's salary, the alteration is *prospective*; it changes the employee's compensation for work that has not yet been performed, and an employee dissatisfied with the change is free to quit without having lost anything. The abrogation of promised retirement benefits, on the other hand, works a *retroactive* change in the compensation the employee receives for work *already performed*.

obligations under such systems in order to deal with budgetary shortfalls and other financial problems. *See* Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered,* 93 Colum. L. Rev. 795, 802 (1993); Darryl B. Simko, *Of Public Pensions, State Constitutional Contract Protection, and Fiscal Constraint,* 69 Temple L. Rev. 1059, 1059-60 (1996). Until this Court provides an up-to-date legal framework for dealing with this question, millions of public employees will remain uncertain whether—in planning for the future—they can rely on the retirement benefits to which they are entitled under existing law.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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